



**Small Business
Development Corporation**

Your ref: A677537

Our ref: D18/1891

Ms J.J. Shaw, MLA
Chair
Economics and Industry Standing Committee
Parliament House
4 Harvest Terrace
WEST PERTH WA 6005

Email: laeisc@parliament.wa.gov.au

Attention: Dr David Worth

Dear Ms Shaw

DRAFT TRANSCRIPT OF HEARING / QUESTIONS ON NOTICE

Further to our recent participation in the Economics and Industry Standing Committee's public hearing in regard to the state of franchising in WA since the enactment of the Small Business and Retail Shop Legislation Amendment Act 2011, we have reviewed the draft transcript and have highlighted a number of minor alterations, as shown at attachment 1.

In relation to the five questions on notice received following the hearing, responses have been prepared as shown at attachment 2.

Should you require any further information or clarification on the information provided, please contact Mr David Eaton, Small Business Commissioner, on 6552 3203.

Yours sincerely

Kitty Prodonovich
CHAIR

29 March 2018

Att (2)

ATT 2: SBDC'S RESPONSE TO SUPPLEMENTARY QUESTIONS

Question 1: Has the SBDC proposed to the Minister an amendment to the *Small Business and Retail Shop Legislation Amendment Act 2011* to provide the Small Business Commissioner the power to compel the provision of certain details in disclosure statement documentation?

Not as yet; the Small Business Development Corporation (SBDC) is considering proposed amendments in the context of enhancing the operation of the *Small Business Development Corporation Act 1983* and providing additional powers for the Small Business Commissioner, and will provide them to the Minister for Small Business once fully conceived.

Question 2: How many small business disputes handled by the SBDC ended up at SAT in 2015-16 and 2016-17, and what proportion of the total disputes for that year did they represent?

The SBDC handles dispute-related matters in a three stage approach with the level of involvement and time spent adjusted for each individual case.

The **first stage** is 'dispute-related enquiries', which are handled by an experienced business adviser who may provide information and guidance to the client that enables them to resolve the dispute themselves without further intervention by the SBDC.

- In 2015-16, the SBDC handled 1,711 dispute-related enquiries; and
- In 2016-17, the SBDC handled 1,005 dispute-related enquiries¹.

The **second stage** involves dispute-related matters that are escalated to a case manager and is the first phase of alternative dispute resolution (ADR). This involves the ADR service taking a practical approach to disputes and working with disputants, small and large, to get them working together again and preserving business relationships.

Central to this 'intensive case management' phase is that ADR case managers act as an *impartial* party taking a *balanced* view of an issue who work with both sides to guide and arrive at a *reasonable* resolution, rather than simply as an advocate of small business over large business.

- In 2015-16, the SBDC handled 424 ADR cases; and
- In 2016-17, the SBDC handled 451 ADR cases.

If disputes cannot be finalised through direct guidance and intensive case management, the **third stage** involves offering disputing parties formal mediation through access to a panel of independent mediators. Mediation is voluntary, with the cost subsidised by the SBDC.

¹ The reduction in dispute-related enquiries between 2015-16 and 2016-17 is associated with a shift in definition. The total volume for enquiries (including non-dispute-related enquiries) increased during the same period.

- In 2015-16, the SBDC provided 16 mediations; and
- In 2016-17, the SBDC provided 32 mediations.

For disputes unable to be resolved through general assistance, investigation and ADR, parties are able to proceed to the State Administrative Tribunal (SAT) or the Courts for a binding decision. For those parties wanting to access the SAT, a certificate from the Small Business Commissioner is issued.

It should be noted that a party to a retail tenancy dispute cannot make an application to the SAT for a decision *without* receiving a certificate from the Commissioner stating that dispute resolution is unlikely to succeed, is not a reasonable course of action under the circumstances or has not succeeded. It also enables the Commissioner to include information on the certificate about the conduct of the parties during the ADR proceedings, which could then be taken into account by the SAT when making decisions and considering how costs might be awarded.

- In 2015-16, the SBDC issued 26 SAT certificates; and
- In 2016-17, the SBDC issued 23 SAT certificates.

It is not known how many of the matters subject to a certificate proceeded to the SAT as the SBDC does not oversee this process once a certificate is issued.

Question 3: How many staff do the SBDC have dedicated to its alternative dispute resolution (ADR) service?

Dispute-related enquiries are handled by the SBDC's business advisory team, which comprises seven (7) FTE positions. This team includes specialist advisers associated with commercial tenancy and other business matters. They also handle non-dispute-related enquiries from prospective and existing small business operators.

The ADR team includes five (5) FTE ADR Case Managers and consumes a quarter of one (1) manager's FTE time.

Formal mediations are conducted by independent mediators drawn from a panel of 55 mediators. The SBDC selects mediators best suited to the subject matter in dispute.

Question 4: For those disputes resolved by SBDC mediation, what is the average timeframe from the lodging of a dispute to reaching an outcome?

An average timeframe for the resolution of a dispute is extremely variable and is often determined by the time an individual party chooses to take to consider their position and progress to the next stage of assistance.

The SBDC also attempts to ensure parties have sufficient information and are in an appropriate emotional state to participate in a formal mediation. This may necessitate a pause in expediting the dispute resolution process, although this is also balanced against the level of urgency of the matter.

For example, once an initiating party has received information from a case manager regarding their options, they may choose to take several days to consider their position before asking for the case manager to engage with the other party and progress with the ADR process.

Once a formal mediation has been offered the mediation can generally occur within 10 business days. On occasion when a matter is extremely urgent and both parties are available, mediations have been arranged within 24 hours.

Similarly on urgent administrative matters associated with the *Commercial Tenancy (Retail Shops) Agreements Act 1985* which require adjudication by the SAT, the matter can be assessed by a case manager and a certificate issued by the Small Business Commissioner within 24 hours.

Question 5: How could the *Small Business and Retail Shop Legislation Amendment Act 2011* be improved to assist in reducing conflicts in franchise businesses?

Interested parties and prospective franchisees are presently able to access the SBDC's advisory service for general and specialist business advice and guidance in relation to franchising.

In addition to general assistance on starting and running a small business, advice can be provided in relation to buying a franchise, evaluating the advantages and disadvantages of entering a franchise operation, leasing business premises, understanding the Franchising Code of Conduct and associated laws, and resolving disputes.

Specifically, a dispute between a franchisee and a franchisor in relation to an unfair market practice can be brought to the Small Business Commissioner if either or both parties are small businesses and reside in Western Australia. In such situations, the ADR service is able to offer preliminary assistance, including information, advice, investigative services, as well as access to mediation if required (see table below).

Financial year	Number of franchise-related disputes	Referred to Intensive Case Management	Resolved via Intensive Case Management	Number of mediations (percentage resolved successfully)
2015/16	22	10	7	3 (66%)
2016/17	20	9	6	2 (50%)

Generally, however, as franchising brands tend to operate nationally, disputes involving a Western Australian-based franchising party are referred to the Office of the Franchising Mediation Adviser (OFMA) for investigation and/or resolution.

The SBDC also feeds relevant issues and emerging trends involving franchising to the appropriate authorities, including the Australian Competition and Consumer Commission (ACCC) and Australian Small Business and Family Enterprise Ombudsman (ASBFEO). This includes providing detailed submissions to relevant reviews and inquiries.